CHANETSA MHARI
versus
THE PRESIDING MAGISTRATE MR MANGOTI N.O
and
THE PROSECUTOR GENERAL
and
THE STATE
and
THE OFFICER IN CHARGE HARARE REMAND PRISON

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 5 March and 11 March 2015

**Urgent Chamber Application-Criminal**

*N Mugiya*, *for* the applicant
*Makoto,* for the respondent

CHIGUMBA J: This is an urgent chamber application in which the applicant seeks an order of release from detention within forty eight hours. The applicant seeks a final order declaring that his detention is wrongful and unlawful and a violation of his rights, and an interdict restraining the respondents from denying the applicant his right to liberty in terms of the law. The founding affidavit was deposed to by the applicant's legal practitioner of record who averred that he was authorized to do so by the applicant because of the urgency of the application. The applicant, being in detention at Harare Remand prison, was unable to depose to the affidavit.

The facts of this matter, as set out in the founding affidavit, are that the applicant was arrested in June 2014 and placed on remand at Mt. Darwin magistrate's court, on a charge of murder. He was jointly charged with three others. He was admitted to bail with the consent of the

state. On 29 September 2014 the applicant and his co-accused were removed from remand following their application. On 19 February 2015, the applicant was arrested and detained at Mt. Darwin police station. 0n 21 February 2015, he was indicted by the first respondent to the High Court for trial on the murder charge.

The applicant, on indictment, was remanded in custody and transferred from Mt. Darwin to Harare Remand prison. The trial is due to commence on 31 March 2015. The issue for determination is whether, in terms of the law, the applicant ought to have been indicted and remanded to the trial date, as opposed to being indicted and remanded in custody until the trial date. Put differently, did the trial court correctly apply the provisions of s 66 of the Criminal Procedure and Evidence Act *[Chapter 9:07],* (CPEA) to the applicant, or was the trial court supposed to deal with the applicant in terms of s 320 of the CPEA? Before dealing with that issue, we will look at whether the requirements of urgency have been met in this matter. "The test for urgency is settled. It is so settled as to be cast in stone. One wonders why legal practitioners continue to grapple with the requirements of urgency, and why they continue to ill advice their clients, resulting in a waste of the court's time and a corresponding waste of resources.

It has been held that:

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules". See [1] .

It has also been held that:

> *"*For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the

[1] Kuvarega V Registrar General and Anor 1998 (1) ZLR 189

court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [2] And[3], [4]

In my view, which I previously expressed in the case of *Finwood Investments Private Limited & Anor* v *Tetrad Investment Bank Limited & Anor* [5], in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met:

A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.

(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.

(c) There is *prima facie* evidence that the applicant treated the matter as urgent.

(d) The applicant gives a sensible, rational and realistic explanation for any delay in taking action.

(e) There is no satisfactory alternative remedy.

In the circumstances of this case, I find that the applicant does have a satisfactory alternative remedy. The applicant must apply for bail pending trial. For that reason this matter is not urgent.

The application is premised on the right of an accused person to liberty, so in my view, an examination of the merits of the matter is warranted. We must determine whether the charge was dismissed in this case by the magistrate's court. We were informed that the applicant was removed from remand on 29 September 2014. Clearly removal from remand is to be distinguished from dismissal of the charge for want of prosecution. A remand will usually be

---

[2] Mathias Madzivanzira & @ Ors v Dexprint Investments Private Limited & Anor HH145-2002"

[3] Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare 2010 (1) ZLR 364(H

[4] Williams v Kroutz Investments Pvt Ltd & Ors HB 25-06, Lucas Mafu & Ors V Solusi University HB 53-07

[5] An unreported HH-2014 case. See also Denenga v Ecobank HH 177-14

requested by the State when it is not ready to bring a case to trial because police investigations are still taking place or the police may be experiencing difficulty in locating vital state witnesses. An accused person can be remanded in custody or out of custody. If the accused is remanded in custody he may apply for admission to bail. The remand period is a maximum of two weeks as provided by s 151 of the CPEA. A remand period of more that fourteen days requires the consent of the accused. Section 49 of the *Constitution of Zimbabwe Amendment (N0. 20) Act 1/2013* provides for the right to personal liberty, that every person has a right to personal liberty, which includes the right not to be detained without trial, not to be deprived of liberty arbitrarily and without just cause. Section 50 now governs the right of accused persons to be brought to trial within a reasonable period.

Magistrates who preside over applications for initial and further remands have a duty to observe the Constitutionally guaranteed rights to personal liberty and to being brought to trial within a reasonable period. See *Magistrates Handbook*[6]**.** The remand court must not go on granting requests for further remand when an unreasonably long period of time has elapsed since the accused was first charged. The remand court has a duty, to the fair and impartial administration of justice, to ensure that the state proceeds to trial within a reasonable period of time. See *Bull* v *Minister of Home Affairs*[7], *Fikilini* v *Attorney General***.**[8] On the factors to be considered in determining whether accused had been on remand for an unreasonably long time, see *S* v *Ruzario*[9], *S* v *Kundishora*[10].

If the court is of the view that further remand of the accused person is not justified or reasonable, it may remove the accused person from remand, usually on the basis that the state can proceed against the accused person by way of summoning him to court, when the docket is complete and the state is ready for trial. The effect of an order of refusal of further remand is not

---

[6] Page 7-9, G Feltoe

[7] 1986(1) ZLR 202(SC)

[8] 1990 (1) ZLR 105 (SC

[9] 1990 (1) ZLR 359(SC)

[10] 1990 (2) ZLR 30 (SC)

to discharge the accused person. The charge remains extant until such a time that the accused is discharged, by an acquittal after plea, or by a withdrawal of the charge before plea.

S320 of the CPEA provides that:

"**320 Dismissal of charge in default of prosecution**

(1) If the prosecutor, whether public or private, does not appear on the court day appointed for the trial, the accused may move the court to discharge him, and the indictment, summons or charge may be dismissed and, when the accused or any other person on his behalf has been bound by recognizance for the appearance of the accused so to take his trial, may further move the court that such recognizance be discharged, and such recognizance may thereupon be discharged.

(2) Where the indictment is at the instance of a private party, the accused may move the court that the private prosecutor and his sureties shall be called on their recognizance and, in default of his appearance, that the same be estreated and the accused may also apply for an order directing the private prosecutor to pay the costs incurred by the accused in preparing his defence.

(3) Nothing in this section shall be construed as depriving the Attorney-General, or public prosecutor with his authority or on his behalf, of the right of withdrawing any indictment, summons or charge at any time before the accused has pleaded, and lodging a fresh indictment or charge or issuing and serving a fresh summons for hearing before the same or any other competent court."

It is my respectful view that s 320 of the CPEA applies to those accused persons who make formal applications before the trial court, for discharge, which application , if acceded to, results in a dismissal of the summons, indictment or charge. On further application, such an accused may be granted a discharge of any recognizances that may have been granted by the court. (Section 320 (1). The word 'discharge' has been described as a transitive verb which is used to describe the release of a prisoner, or the acquittal of somebody in a court of law. 'The word 'dismissal' has been defined as 'the rejection of something from consideration'. A combination of the two words, results in the inescapable conclusion that, an application in terms of section 320 of the CPEA, if positively accepted by the court, results in the acquittal of an accused person of the charges preferred against him, and to the rendering of the charge to be unworthy of consideration for any purposes.

Section 320 does not apply to the applicant's circumstances. The applicant did not apply for discharge for want of prosecution which would have entitled him to be discharged. Discharge does not result when an application for refusal from remand is granted. A refusal of

further remand does not result in the acquittal of an accused person. The effect of a discharge in terms of s 320 is set out in s 322 as follows:

> "**321 Liberation of accused persons**
>
> Any person who is acquitted on any indictment, summons or charge or whose case has been dismissed for want of prosecution shall forthwith be discharged from custody."

It has not been submitted that the effect of the removal of the applicant from remand was an acquittal. It was accepted that the State could legitimately bring the same charge against the applicant. That in my view is where the applicant's case crumbles, seeing that the applicant's case was premised on the provisions of s 320 of the CPEA. Once an accused is acquitted, it is impermissible to bring the same charge again against him. Not so with removal from remand. It was submitted by counsel for the state Mr *Makoto*, which submission I accepted as correct, that the correct section that applies to the applicant's circumstances, is s 66 of the CPEA, which provides that:

> "**66 Summary committal for trial of accused person**
>
> (1) If the Attorney-General is of the opinion that any person is under reasonable suspicion of having committed an offence for which the person may be tried in the High Court, the Attorney-General shall cause written notice to be served on—
> (*a*) a magistrate for the province within which the person concerned resides or for the time being is present;
> or
> (*b*) any magistrate before whom the trial of the offence could be held in respect of the offence concerned;
> informing the magistrate of his or her decision to indict the person concerned for trial before the High Court and of the offence for which the person is to be tried.
> (2) *On receipt of a notice in terms of subsection (1), the magistrate shall cause the person concerned to be brought before him or her and, notwithstanding any other provision of this Act,* shall forthwith commit the person for trial before the High Court *and grant a warrant to commit him or her to prison, there to be detained till brought to trial before the High Court* for the offence specified in the warrant or till admitted to bail or liberated in the course of law. (my emphasis) See *Garikai Mukuze and Alexio Kutapa* v *State*[11].

[11] HH17-2005

Section 66(2) is peremptory. On receipt of the notice of indictment the magistrate shall cause the person concerned to be brought before him and, notwithstanding any other provisions of the CPEA shall commit the person for trail to the High Court till admitted to bail. There is no provision in s 66(1) for the admission to bail of the indictee by the magistrate court. The wording of s 66(2) is clear. Once indicted for trial to the High Court, the applicant could only have been released on bail by application to the High Court. This is the suitable alternative remedy that the applicant has. I am fortified in this view by the provisions of s 169 of the CPEA:

> **"169 Termination of bail on plea to indictment in High Court**
> If the accused is indicted in the High Court after having been admitted to bail, his plea to the indictment shall, unless the court otherwise directs, have the effect of terminating his bail, and he shall thereupon be detained in custody until the conclusion of the trial in the same manner in every respect as if he had not been admitted to bail".

The applicant is at liberty to apply for admission to bail pending trial in the normal course of things. He is not precluded from being admitted to bail pending trial. A Judge sitting in chambers may not illicitly release the applicant from the effect of his indictment for trial on a charge of murder. A properly constituted bail court may do so, on the strength of appropriate submissions for consideration of suitability for admission to bail pending trial. This application was not urgent. One of the requirements of urgency, the lack of a suitable alternative remedy, was not met. With regards to the merits of the matter, s 320 of the CPEA has no application to the circumstances of this case. The applicant is governed by the provisions of s 66 of the CPEA, which permit the course of action that the applicant seeks to impugn. The relief sought is incompetent, and not supported by the averments filed on behalf of the applicant.

For these reasons, the application is dismissed.

*Mugiya and Macharaga Law Chambers,* Applicant's Legal Practitioners
*Prosecutor General,* Respondent's Legal Practitioners